PUBLIC LAW Journal

Vol. 22, No. 4
Fall 1999

An Official Publication of the State Bar of California Public Law Section

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Message From The Chair

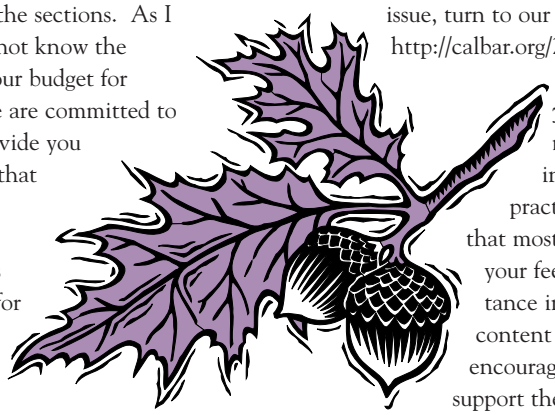
By Paul A. Kramer

First and foremost, I thank my predecessors, Ricarda Bennett and Judith Trice, 1998-99 co-chairs, for their stellar efforts in keeping the section running on all cylinders during the past year as the State Bar's funding "crisis" continued. It was not easy as Ricarda was constantly looking for ways to save a buck here and there. Most of our meetings were held by telephone. The result was worthwhile, though, as we appear (as of early September) to be breaking even for the year. In addition to keeping our own budget in shape, Ricarda and Judith have been battling for our section and the other small sections in the allocation of Bar administrative costs among the sections. As I write this, we do not know the exact impact on our budget for 1999-2000 but we are committed to continuing to provide you with the services that you've come to expect.

We're always looking for ideas for improving our communication with section members. A member's only email list is under consideration. It is achievable without breaking our budget but, to this point, an underwhelming response from the members has caused us to slow its implementation. How about it—are you interested in participating in email discussions of common issues or receiving more timely information via email? If so, send me a note at publiclaw@hotmail.com. Once we have a sufficient core group of users, we'll get the ball rolling. The executive committee already conducts much of its business via email and a group mailing list.

Congratulations to our Public Lawyer of the Year, Joanne Speers of the League of Cities, who received her award from Chief Justice George during our reception at the State Bar Annual Meeting in Long Beach. If we didn't see you at the reception, we hope that we'll see you next year.

In my next message, I'll report to you on the results of our retreat in October and the direction that the executive committee choose for '99-00. If you'd like to see that information earlier than the Spring release of that issue, turn to our Web site — http://calbar.org/2sec/3pls/2plsndx.htm. Remember, this is *your* section; our mission is to assist and inform you in your practice. In order to do that most effectively, we need your feedback and your assistance in providing editorial content for the Journal, encouraging your colleagues to support the section by becoming members and volunteering to serve on the executive committee.



Although I write this in September for publication in December, its not too early to remind you that the deadline for applying for appointment to the executive committee will most likely be early March. Applications will likely be available in the State Bar Journal in December or January. You may find more information at our Web site at the bottom of the executive committee roster.

PUBLIC LAW JOURNAL

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MCLE Self Study:

Twenty Ways to Improve Your Administrative Record and Increase Your Chances for Success in CEQA Litigation

by: M. Katherine Jenson, Rutan & Tucker, LLP*

The scenario is a common one. Our clients ask us to perform a seemingly straightforward task: "Make sure this EIR (or, more often, this negative declaration) is bullet-proof." While we can review the CEQA documentation for compliance with the letter of the law, compliant documents are merely the first step towards an ultimate CEQA victory. Judges make decisions on CEQA challenges after having only a small amount of time to read the briefing and review the administrative record. What influences judges to reach their decisions in CEQA challenges sometimes has less to do with whether an EIR or a negative declaration complies with the letter of the law, and more to do with the court's general perceptions of the lead agency, the project, the environmental consultants and the challenger. A CEQA litigator is given one primary tool with which to create these perceptions—the administrative record.

Here are 20 tips I have picked up in the CEQA litigation trenches which, if followed in conjunction with having compliant CEQA documents, will help pave the way to a CEQA victory in court.1

TIP NO. 1

Make sure that the lead agency's staff and the project proponent understand that the only evidence that can be used to defend a project is what is actually submitted during the administrative proceedings.

How many times have we heard something like "Don't worry, we'll hire a traffic engineer if we get sued." Under *Western States Petroleum v. Superior Court*,[2] the court will almost always limit its review to the evidence in the record. It is therefore critical that everyone on your team understands the importance of having a complete administrative record that discloses the factual and analytical basis for the agency's CEQA determination.

TIP NO. 2

If the challenger's motives are not truly environmental, make sure there is evidence of the motivation in the record.

While to date, the motives behind the filing of a CEQA challenge have been treated as legally irrelevant to the ultimate decision of whether there has been CEQA compliance, judges are human beings and "gray areas" in CEQA are far more prevalent than bright line situations. While it may be obvious to everyone familiar with a situation that the motive behind a CEQA challenge has nothing to do with the environment (e.g., preventing the development of a competing business or jurisdictional fighting over sales tax sources), it likely will not be obvious to the court. It is therefore necessary to document the challenger's motives in the record in the most complete manner possible. For example, did the neighboring city, which appears to be gearing up to challenge your agency's approval of a project, try to get the very same project within its boundaries? Correspondence indicating that the challenging agency thought the project was wonderful until it became apparent that the project was going to be located within your agency's borders is the type of gem that makes CEQA defense attorneys salivate. If there is nothing in writing to this effect, but the sentiments have nonetheless been communicated orally, have the project proponent or others who were a party to the conversation submit a sworn statement outlining what was stated. (E.g., the conversation the project proponent had with the neighboring city's general manager in which the manager outlined that unless the project was located in the neighboring city, that city would sue to stop the project.)

TIP NO. 3

Determine whether the potential challenger is suffering from the "do as I say and not as I do" syndrome, and if so, document this in the record.

For example, a neighboring jurisdiction is complaining that the project under review is so large that "you can't possibly approve it without an EIR." Yet just last month, that same agency approved a project that was twice as big and generated three times the traffic with only

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a negative declaration. Or, a competing business, which itself was approved with a negative declaration, now purportedly is worried about the environment and is objecting to the project. While, once again, this is not legally relevant, exposing the challenger as a CEQA hypocrite may cause a judge to more closely examine the challenger's claims.

TIP NO. 4

Coach the decisionmakers to ask challengers, during their oral comments, precisely what it is about the CEQA documents or CEQA processing that they object to and how it would affect them.

Often times, you will find that the speaker has no ability to articulate any specific CEQA violation, which is an effective argument in the later CEQA briefing. See, e.g., *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*.[3] Questions such as the following may make it clear for the record that the person raising the CEQA objection has no real idea of any specific violation: What specific information did you find was missing from the EIR/initial study? What evidence do you have that impact X will be significant? Are you suggesting that we impose any specific additional mitigation measure to this project? If so, what? What basis do you have for concluding that the proposed mitigation measures will not work? How would the alleged impact affect you?

TIP NO. 5

Effectively use your consultants.

Why is there always a "consultant's row" out in the audience, filled with highly paid professionals who generally do not speak unless one of the decisionmakers has a question that staff cannot answer? More often than not, the consultants escape the evening without having uttered a single word on the record. While there is little point in having an expert simply repeat what is in his or her written report, each expert should, at a minimum, state on the record, directly to the decisionmakers, his or her conclusions relative to CEQA concerns. E.g., "I have 30 years of experience in analyzing the traffic impacts of projects similar to this one. I have fully analyzed the traffic impacts that this project will have and, with the recommended mitigation measures, it is my professional opinion that this project will not exceed the threshold of significance that this agency has adopted for traffic impacts." In less than a minute or two, an expert can create a "quotable quote" for briefing purposes. In the litigation context, there is value in the fact that the lead agency's traffic consultant actually "testified" before the decisionmaking body in a manner which supports the body's findings.

TIP NO. 6

Review your experts' planned oral comments before they are made.

Experts are often sloppy with their comments and can make statements that are either vague or contrary to their prior written reports or their other opinions. While we normally get a chance to review one or two screencheck copies of their written reports, experts often are asked to testify without any discussion of what they plan to say. This potentially dangerous situation can be avoided by discussing the expert's oral testimony before the hearing. During that time, you should also go over the expert's responses to any questions or objections that are likely to come up during the hearing.

TIP NO. 7

Make sure that the relevant expert qualifications of all persons providing expert opinions on behalf of the lead agency or the project proponent are documented during the administrative proceedings.

This can be done by introducing the experts' resumes into the record during the proceedings. You should review the resumes in advance to make sure they contain the relevant qualifications and experience of the consultants. It is not very effective to simply request a consultant to bring his or her resume to the hearing to submit into the record, because the resume can be generic, out of date, or demonstrates primary expertise in areas other than the subject in which the expert is providing opinions to the lead agency. It is most useful if the expert tailors his or her resume to the specific situation, emphasizing the training and experience that is directly relevant to the work done on the project. There is also a benefit to having this information put in the record during the last public hearing before action on the project is taken. If submission is made in advance, it may tip off the project opponents that they should be submitting the qualifications of their own experts. This type of submission is often overlooked. It is advantageous during the later litigation to be able to state: "There is no evidence in the record that Mr. X is qualified to render the opinion he presented to the city council."

TIP NO. 8

Make sure that the administrative record reflects the amount of resources that have been expended in undertaking the environmental review and a summary of the consultant selection process if there was competition for the environmental work.

If the environmental consulting work has been completed by outside consultants hired by the lead agency, the record should reflect the expense incurred. If the amount is sizable, it is worth mentioning in the briefing. This lets the court know that environmental review was a serious and expensive undertaking. If the analysis is done in-house, and if records are kept regarding the hours spent, this too could be valuable. Moreover, if the lead agency went through a request for proposal process and selected a competent consultant among several competing qualified firms, this may be a favorable fact in later litigation. Make sure it is reflected in the record.

TIP NO. 9

The staff report is often the last opportunity to provide written information which may be useful to the CEQA defense attorneys in court—don't let the staff waste this opportunity to bolster the record.

The opinions of staff have been held to constitute substantial evidence upon which the lead agency may rely. See e.g. *Browning-Ferris Industries of California v. City Council of San Jose*.[4] By the time a project is making its way to public hearing, staff is usually so tired of it that the natural tendency may be to prepare a two-page, bare-bones staff report. Make staff aware that the report is usually the last chance to present coherent, written evidence and to fill in any holes in the record. The staff report should dispose of any additional comments or objections that have not already been addressed. It also provides the perfect vehicle for presenting the factual basis to support findings of benefit in a statement of overriding considerations. It can reference and attach materials from the project proponent that provide detail about similar projects. It should outline the CEQA process which was followed, with special emphasis on compliance with all procedural and noticing requirements, as well as the compliance with the public review requirements. If additional informal scoping efforts were undertaken, the staff

report is the appropriate place for these efforts to be outlined.

TIP NO. 10

Caution the lead agency's staff, the environmental consultants, and the project proponent about the risk of creating documents subject to disclosure under the Public Records Act[5] or which might otherwise end up in the administrative record.

Everyone needs to be aware of the likelihood that a savvy project challenger will submit a Public Records Act request (or simply show up at the lead agency's offices with a copy service in tow) demanding access to the project file. In the fax/e-mail world we live in, the potential for damaging written communications to end up in an administrative record is high. While consultants often need to communicate in writing, they need to be aware of the potential that their correspondence, e-mails, memoranda and faxes may be obtained by challengers. Here are just two examples of statements that would give any CEQA defense attorney litigation heartburn: (1) a consultant stating in a fax that "it will take some creative mitigation to reduce these impacts to a level of insignificance" in a situation where there were no additional mitigation measures identified and the EIR concluded that the impacts were insignificant; and (2) comments by city staff members, in writing, that they really believe an EIR is required, but they will allow a developer to proceed at its own risk on the basis of a negative declaration.[6]

TIP NO. 11

If the specific objections being raised are within purview of another governmental agency which is satisfied with the environmental documentation and proposed mitigation measures, try to obtain written confirmation or oral testimony from that agency of its satisfaction, or at a minimum, document such satisfaction in official correspondence to the agency which can be added to the record.

This type of situation arises frequently in situations in which the lead agency or project proponent, through scoping or negotiations, satisfies the concerns of a state trustee of resources (e.g., the California Department of Fish & Game), but still faces a challenge by an environmental group. Judges may be unlikely to go out on a limb for a project challenger where an agency specifically charged with protecting a particular resource has signed off on a project.

TIP NO. 12

Make sure the record includes a detailed outline of any informal negotiations or efforts that the lead agency staff or the project proponents have undertaken to alleviate the concern of the challengers.

Many times such meetings and negotiations will reveal that the party challenging the project is being unreasonable and nothing within the lead agency's power will satisfy the challenger. Demonstrating to the judge that all reasonable efforts were taken to address the legitimate concerns of the petitioner may go a long way when the court gets into the "gray areas" of the litigation, including the selection of an appropriate remedy should the court conclude an irregularity occurred.

TIP NO. 13

Cross-check all proposed CEQA findings to verify that the administrative record will support each of the factual findings to be made by the lead agency.

While the EIR and appendices thereto will normally provide the factual support for the CEQA findings, many times the findings go beyond the EIR to such things as project benefits identified in a statement of overriding consideration. Pursuant to Public Resources Code sections 21168 and 21168.5, substantial evidence supporting each such benefit must be before the decisionmakers in one form or another.

TIP NO. 14

Make sure that the administrative record reflects that the lead agency has exercised its discretion and reached a conclusion on all important CEQA issues, and has done so using its independent judgment.

For your typical EIR or negative declaration decision, this is usually pretty obvious, since the agency's certification must take a specific form and include specific findings.[7] However, in other situations, it is less obvious when the agency must make a specific CEQA finding. For example, if the agency is taking action on a project which it previously approved, it is often advisable to include a specific finding that the conditions which trigger the preparation of a subsequent EIR or negative declaration (a changed project, changed circumstances, or new information) under Public Resources Code section 21166 are not present. If such a finding is made, there is a basis for arguing that the court must give deference to the lead agency's determination.

TIP NO. 15

Try to keep any dissenting decisionmakers from handing the opponents a CEQA challenge on a silver platter.

The decisionmakers should be able to differentiate between certifying the informational environmental documentation for the project and the approval of the project on the merits. Unless a decisionmaker has a concern about the adequacy of the environmental documentation, that decisionmaker should be able to render a decision on the CEQA documentation separate and apart from the project approval. It is highly beneficial in subsequent litigation to be able to demonstrate that the certification of an EIR or a negative declaration was unanimous even if the decision on the project was split. Unless they have a genuine concern about compliance with CEQA, the minority members of a council, commission or board should be aware that their comments are likely to be used against the lead agency in any subsequent CEQA challenge. Even the comments of a single decisionmaker can be damning to a project in court. For example, in *Stanislaus Audubon Society, Inc. v. County of Stanislaus*,[8] the court, in striking down a negative declaration, quoted the following statement by a planning commissioner: "[W]e are fooling ourselves if we don't think [the project] is growth inducing..."[9]

TIP NO. 16

Have a court reporter present at all public hearings to transcribe the proceedings.

When a legal challenge is a certainty, the expense involved with a court reporter (which the project proponent will normally pay) is money well spent. An after-the-fact attempt to decipher audio-tapes is a miserable experience for all involved, is time consuming, and often results in an incomplete or inaccurate record of what transpired. The court reporter should have clear instructions to interrupt speakers to get clarifications or to require them to speak more slowly. The chair of the meeting must be warned that the court reporter will need an occasional break in long proceedings. If the proceedings are videotaped, it is somewhat less essential to have a court reporter present.

TIP NO. 17

If the lead agency is relatively certain that a lawsuit will be filed, and if time will be of the essence once it is filed, utilize the time period between the approval of the project and the filing of the lawsuit to complete the preparation and certification of the administrative record, thereby discouraging the petitioner from exercising the option of preparing the record.

Under CEQA, the lead agency normally has 60 days from the request to prepare the administrative record to complete its preparation.[10] This deadline typically runs between 60-70 days after the CEQA petition has been filed. Having the record completed and certified in advance of the filing of the petition can eliminate months of delay and allow the lead agency/project proponent defense team to take control of the litigation. (This ties into Tip No. 20, below.) This may also prevent petitioners from insisting on preparing the record themselves, which is their right pursuant to Public Resources Code section 21167.6(b)(2). When petitioners elect to prepare the record, it becomes difficult to control the timing of the litigation and to insure that nothing has been wrongfully added to or omitted from the record. Most courts would not permit a petitioner to insist on preparing the record if the record is already completed. One downside of preparing the record before being requested to do so is that it may make it more difficult to recover the costs of the record. A petitioner who files an election to prepare the record may have a good claim that he or she should not be responsible for the costs since he or she could have avoided much of the expense. Another tricky issue is when the petitioner should pay for the record. Many agencies insist that the petitioner pay in advance of the preparation. Disputes about when the payment is due or what amount is owed can cause weeks or even months of delay. It may be more expedient to simply keep accurate records of all costs associated with the preparation, compilation, indexing, copying, service and lodging of the administrative record, including paralegal or document clerk time, and to include the costs in the cost bill once the judgment is entered in favor of the lead agency.

TIP NO. 18

Do not relegate the task of preparing the administrative record to anyone who does not have a clear understanding of what should and should not be included.

In many instances, cities will assign the duty of compiling the administrative record to a junior staff person unfamiliar with the project. This is dangerous. In all cases, the record should be assembled by lead agency staff members who are intimately familiar with the project and with the direct assistance of the attorney who will be defending the CEQA documents and decisions. The content of the record is governed by Public Resources Code section 21167.6(e). Legal counsel should review every document which is proposed for inclusion in the record to verify whether the document falls within the scope of Public Resources Code section 21167.6(e), and use the opportunity to become familiar with all aspects of the project and the record.

TIP NO. 19

Beware of the "everything-but-the-kitchen-sink" approach to preparing the administrative record.

Many lead agencies simply take all of the files from different departments relating to a project and put everything in the administrative record. The apparent hope is that the record will be too massive to review or copy, or to demonstrate the literal "weight" of the evidence in support of the project. The obvious risk of doing this is that a determined petitioner will take the time to review every page of the purported record and end up finding items which put the project in a bad light or which cause the court to doubt the credibility of the lead agency. Many times these items will be outside the scope of Public Resources Code section 21167.6(e) and should therefore not have been in the record in the first place. For example, internal marked up drafts may reveal concerns that the lead agency staff had which were never addressed. If such drafts were not released for public review, they should not be in the record.[11] The indiscriminate compilation of the administrative record may result in the inadvertent disclosure of materials that are highly embarrassing to the lead agency or the project proponent, which, even though irrelevant to the issue of compliance with CEQA, could create a very negative impression for the judge.[12] Thus, the "bury-them-in-paper" approach is dangerous and not recommended.

TIP NO. 20

Once the lead agency expedites the completion of the administrative record, it should consider the "let's get on with it" approach to litigation.

Many CEQA defense lawyers seem resigned to letting the petitioner's counsel set the pace of the litigation and to simply react as necessary. In many instances, it is highly advantageous to take the lead and force the petitioner's counsel to move at your pace. Additionally, it creates a positive impression with the court if the lead agency is the one pushing to get on with the judicial review. A petitioner who fights against an expedited schedule sends the message that the challenge may be weak, that the challenger's counsel is unprepared, or that the real motive is delay. As stated above in Tip No. 17, one of the keys to taking control of the litigation is to complete the administrative record expeditiously. Once that is done, there is no reason why the case cannot move forward rapidly. For example, in Los Angeles County, once the lead agency serves the administrative record on the petitioner's counsel, the petitioner only has 30 days to file the opening brief.[13] If a petitioner was counting on having 70 days before the record would be served, being notified that the opening brief is due in 30 days can be disconcerting. In other jurisdictions, as soon as the record is completed, the lead agency is free to make an ex parte application pursuant to Public Resources Code section 21167.4(a) to have the court set an expedited briefing and hearing schedule. In the alternative, consider serving the administrative record on the petitioner's counsel along with a motion to have the petition for writ of mandate heard and denied. Pursuant to Code of Civil Procedure section 1108, and where not precluded by local rule, it is appropriate for a respondent to set a hearing on the petition for writ, giving the requisite 15 days notice. One benefit of proceeding this way is that as moving party, the respondent would get to file the opening and closing briefs.[14] Many courts might give the petitioner a limited extension to file a brief, but by and large, the courts are sympathetic with respondents requesting that the matter be determined quickly so that the pendency of the litigation does not unnecessarily jeopardize a project due to passage of time considerations.

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Contingent Worker Litigation:

Is Your Organization at Risk?

*By Daphne M. Humphreys, Esq. and Gregory M. Bergman, Esq.**

INTRODUCTION

During the last few years, lawsuits by various groups of contingent workers have surfaced as a new litigation trend. The litigation has been fueled by several highly publicized cases in which major companies such as Microsoft, Pacific Gas & Electric, Pacific Bell, Time Warner, and Arco have had to defend themselves against lawsuits by various temporary agency workers, freelancers and independent contractors seeking access to company health and welfare benefits, stock option plans, and pension plans.[1]

Even though it is well established that public employment is governed by statute,[2] public entities have not been immune from such suits. Various public entities have also been the targets of class action lawsuits by groups of contingent workers seeking not only access to pension and health benefits, but also to the status of employees of the public entity.[3]

These recent lawsuits have resulted in increasing scrutiny upon the manner in which companies and public entities classify their workforce. Given the increased attention that has been given to this issue, any employer which utilizes contingent worker arrangements to supplement the regular workforce may become a target of worker mis-classification claims. This article provides a general overview of "contingent worker" litigation, identifies issues which are often raised in the context of contingent workers litigation, and identifies employment practices which should be reviewed to determine whether an organization that utilizes contingent workers may be at risk for contingent worker liability.

WHO ARE CONTINGENT WORKERS?

The term "contingent worker" has no fixed meaning.

However, the term generally refers to workers who are outside an employer's "core" work force of "regular" "designated" or "permanent" employees. There are numerous arrangements by which employers obtain the services of contingent workers to supplement its core workforce. Some of the more common arrangements include the following:

Temporary Employee

Most employers have categories of employment which provide for part-time and/or full-time temporary employees. Temporary employees are scheduled to work regularly on less than a full time basis or are hired for a limited duration to work on a specific project. Although the employer considers these workers "employees," such workers may or may not be eligible for all of the benefits the employer offers to its regular employees.

Independent Contractor/ Freelancer

Independent contractors are workers whose services are obtained by contract to perform specialized tasks which generally require a high degree of skill, independent judgment and discretion. As such, independent contractors determine the manner and means by which they accomplish the specific task and do not work under the control of the client organization. Independent contractors are responsible for making their own social security contributions, payment of various employment taxes and reporting of income to state and federal authorities.

Traditional Temporary Agency Employee

The classic contingent worker is a worker who is hired by a temporary help agency to work at the offices of the client/recipient on a short-term basis to supplement the client's workforce due to employee absences, short-term projects, or seasonal work fluctuations.

Contract Technical Workers

Contract technical workers have become one of the largest groups of contingent workers as companies require highly skilled workers (engineers, computer programmers) to work on special capital projects. The contract technical workers provide services pursuant to contracts entered into between the client organization and the technical services firm.

Leased Workers

Leased workers are a specific type of independent contractor or agency employee. Leased employees are (1) independent contractors or common law employees of an employment agency, (2) who perform services for the recipient company on a substantially full-time basis for a period of at least one year, and (3) who perform their work under the 'primary direction or control' of the recipient company.

Outsourced Workers

Outsourcing is typically an arrangement in which an outside firm, with particular expertise, contracts not just to supply personnel, but also agrees to assume complete responsibility for the specific service that is the subject of the contract. Outsourcing is often used to perform non-core functions such as the provision of food services, landscaping, and security.

CLAIMS OF CONTINGENT WORKERS

The precise nature of claims brought by contingent workers varies from case to case. However, in general, contingent workers seek to obtain access to benefits that the service recipient provides to its regular "core" employees on a retrospective and prospective basis. In some cases, contingent workers seek an order that the workers are regular employees of the entity.

Contingent workers claim that they are entitled to receive the same benefits that regular employees receive and treatment as regular employees on the grounds that they perform the same work under the same conditions as regular employees. Contingent workers claim that their classification as temporary agency workers, independent contractors or temporary workers is purely arbitrary and is an improper

attempt by the organization which utilizes their services to avoid providing employee benefits and rights to the workers.

WHY THE RISE OF WORKER CLASSIFICATION LITIGATION?

The law has always drawn important distinctions between workers who are classified as "common law employees" and workers who perform services for the organization in another capacity such as an independent contractor or as an employee of a business entity that has agreed to provide services to the organization. Classification of a worker as an "employee" or "non-employee" is a critical factor in determining the liability of the recipient of services in a variety of contexts such as:

1 Liability to the worker for employee benefits, employment discrimination, unemployment insurance, worker's compensation;
2 Liability to governmental agencies such as the IRS for FICA or income tax withholding;
3 Liability to a third party for injuries caused by a worker.

Although these distinctions between employee and non-employee have long been recognized, the new emphasis on worker classification issues is largely attributable to the enormous growth of the contingent workforce in recent years. Employers hire contingent workers in an effort to control costs, to maximize workforce flexibility, to obtain skills that are not available in-house and to adjust to fluctuating business cycles. Individuals have participated in contingent workforce arrangements to obtain flexible work schedules, take advantage of higher hourly wages and to obtain new skill sets.

In 1995, a study on Contingent Worker/Alternative Work Arrangement found that approximately 1 of every 10 workers in the United States was employed in an alternative work arrangement.[4] Additionally, there is a growing trend to utilize "temporary services" for prolonged periods of time. The Bureau of Labor Statistics reported that in 1997, 29% of the temporary agency workforce were employed by temporary agencies to remain on the same assignment for a year or more.[5] It has been estimated that the temporary employment agency - or staffing business is now an industry with $88 billion in annual revenue in the United States and $130 billion worldwide.

The focus on worker classification issues has also been prompted by the work of IRS employment tax auditors during the past decade. IRS employment tax auditors have scrutinized the use of independent contractors and have often re-classified self employed contractors as common law employees of the entities who utilize their services.[6] Re-classification of independent contractors as common law employees has in turned spawned claims by such workers for benefits based on their newly recognized common law employee status. For example, the highly publicized case of *Vizcaino v. Microsoft*, stemmed from an IRS audit which resulted in the re-classification of persons classified by Microsoft as freelancers/independent contractors. In that case, a group of workers who performed services at Microsoft pursuant to independent contractor agreements and agreements with third party temporary employment agencies sued Microsoft to recover various benefits that Microsoft offered to regular employees.[7] The Court held that all common law employees of Microsoft are entitled to participate in Microsoft's tax-qualified Employee Stock Purchase Plan ("ESPP") even though the workers had been informed that they were ineligible for such benefits and had signed contracts disclaiming employee benefits.[8]

The IRS is not the only agency which examines an employer's classification of workers. Agencies such as the U.S. Department of Labor, California Employment Development Department, and the California Worker's Compensation Appeals Board also examine a the classification of workers under a variety of tests established by the courts and/or individual agencies.[9] In another highly publicized action, in the fall of 1998, the US Labor Department ("DOL") filed a suit against Time Warner. The DOL alleges that the company impermissibly denied health and pension benefits to hundreds of writers, photographers and artists designated by Time Warner as "temps" or "contractors." The DOL claims that these workers qualify as common law employees of Time Warner and is seeking a court order to appoint an independent entity to audit the company, locate and identify all misclassified workers from 1974 to the present, and to provide them with the opportunity to file claims for retroactive benefits.

Recent judicial decisions regarding claims for employee benefits have also kept issues relating to worker classification in the headlines. In the case of *Burrey v. Pacific Gas & Electric Co.*, temporary clerical workers who were outsourced to an employment agency and then leased back to PG&E claimed that they were common law employees of PG&E and were therefore entitled to retroactive retirement benefits and health benefits.[10] Although PG&E's retirement and savings plans at issue attempted to exclude the leased workers as defined by section 414(n) of the Internal Revenue Code, the Court found that the exclusion was ineffective for excluding the plaintiffs because they were common law employees. The Court specifically held that a common law employee does not qualify as a leased employee under section 414(n).

Worker classification issues are not solely limited to the realm of tax labor and employee benefit litigation. Contingent workers may also challenge an employer's use of contingent workers on the grounds that the use violates employment discrimination laws. In December of 1997, the U.S. Equal Employment Opportunity Commission (EEOC) issued enforcement guidelines to its investigators regarding the application of federal employment discrimination statutes (i.e., Title VII of the Civil Rights of 1964, the American with Disabilities Act, the Age Discrimination in Employment Act, and the Equal Pay Act) to contingent workers placed by temporary employment agencies and other staffing firms.[11] The Guidance specifically provides that "staffing firms" must hire and make job assignments in a non-discriminatory manner. It also provides that the client/recipient company must treat the "staffing firm worker" assigned to it in a non-discriminatory manner. Both entities are responsible for ensuring that temporary agency workers are not subject to unlawful discrimination. The Guidance makes clear that companies cannot insulate themselves from liability for employment practices by contracting them out to staffing firms. Thus contingent workers may also add anti-discrimination statutes to their arsenal.

Most recently, a bill was introduced in the House of Representatives, entitled "Equity for Temporary Workers Act of 1999."[12] The proposed legislation seeks to eliminate discrimination with respect to wages, hours, and other terms and conditions of employment against any temporary employee. Specifically, the legislation provides that after a temporary workers works for an employer for 1,000 hours during a 12-month period, the employee shall be eligible to receive any benefit offered by the employer to other permanent employees, regardless of whether the worker is placed in the employ of the employer by the employer, a temporary help agency or staffing firm, or under a leasing arrangement by a third party.

In sum, the continuing publicity surrounding the use contingent labor will likely continue to fuel worker classification litigation.

COMMON EMPLOYMENT PRACTICES TO ASSESS T0 MINIMIZE POTENTIAL RISKS ASSOCIATED WITH THE USE OF CONTINGENT WORKERS

Any organization that utilizes contingent workers to perform key services on an on-going basis is potentially at risk for contingent worker litigation. Although a comprehensive listing and discussion is beyond the scope of this article, to minimize the risk of contingent worker liability, the following areas of employment practices should be reviewed and revised, where necessary.

A. CONTINGENT STAFFING ARRANGEMENTS

To evaluate potential liability, the first step is to conduct a thorough review of how contingent workers are utilized in the organization. The review should include the following:

1 Identify all workers who perform services in any capacity throughout the organization (i.e. independent contractors, temporary agency employees, leased employees)

2 Determine what services are provided by contingent workers

3 Determine the duration of each contingent workers' assignment (Note - the court in *Burrey v. PG&E* found that temporary workers who are engaged for more than one year are presumptively common law employees of the recipient and potentially entitled to employee benefits depending on the terms of the benefit plans.)

4 Evaluate the terms and conditions of the contingent workers' assignment (i.e. are they working side by side regular employees performing the same tasks as regular employees?)

5 Assess why such services are being provided by contingent workers as opposed to the regular workforce (Are temporary workers performing "core" services as opposed to short-term or non-core functions?)

6 Evaluate the nature of the relationships between the temporary services agencies and the temporary workers to ensure a legally cognizable employment relationship between the temporary agency and the worker can be established. (Does the temporary agency exercise the requisite degree of control over the worker?)

7 Review contracts between the client organization and temporary agencies as well as contracts between service recipients and independent contractors to ensure that the contracts contain provisions to minimize risks of potential liability. Although a written agreement cannot transform an employment relationship if one already exists, the terms of the contracts can play an important role in establishing the framework for the working relationship. For example, contracts should be reviewed to ensure that relationships between the temporary agency worker, independent contractor and service recipient are clearly defined. The contracts should clearly define which entity is responsible for the provision of employee benefits, payment of salaries, income tax deductions, unemployment insurance taxes, etc. Evaluate whether the contracts contain adequate indemnification provisions for employment-related claims by temporary agency workers and independent contractors. Ensure that the contracts establish policies and procedures regarding anti-discrimination practices.

B. RECORD KEEPING PROCEDURES

The nature of record keeping regarding the use of contingent labor may also pose risks. Under various government regulations, entities are required to report certain information relating to contingent workers.[13] Likewise, basic information about contingent workers on-site is necessary from the emergency procedure standpoint. However, the maintenance of records which resemble personnel records by the client organization may be found to constitute evidence of an employer-employee relationship between the temporary worker and the client organization. Thus, policies and procedures regarding record keeping should be reviewed to ensure that the client organization's record keeping practices do not expose the client organization to the risk of being deemed an employer for all purposes.

C. ELIGIBILITY PROVISIONS OF EMPLOYEE-BENEFIT PLANS

In response to the changing legal climate, employers should review eligibility provisions of employee benefit plans to determine whether or not contingent workers have been properly excluded.

D. EMPLOYEE CLASSIFICATIONS

Employee classification documents should also be reviewed to ensure that the classification system is consistent with the terms utilized in employee benefit plans, policies governing the use of temporary labor, as well as with the actual use of labor throughout the organization.

E. POLICIES AND PROCEDURES FOR CONTRACTING WITH TEMPORARY EMPLOYMENT AGENCIES AND INDEPENDENT CONTRACTORS

Various standards have been set by governmental agencies and the courts to determine the status of temporary agency workers and independent contractors.[14] Procedures for the retention of temporary services should be implemented and persons responsible for the retention of temporary services should be trained regarding the procedures to ensure that the contingent worker's status is not compromised.

F. POLICIES AND PROCEDURES REGARDING ANTI-DISCRIMINATION

As noted above, employers cannot insulate themselves from liability for discriminatory employment practices by contracting them out to staffing firms. Employers should review their own personnel policies, anti-discrimination training and other anti-discrimination practices and procedures to ensure that the policies adequately address the use of contingent workers in the organization.

By reviewing the employment practices set forth above, organizations that utilize the services of contingent workers will be in a stronger position to identify employment practices which may expose the organization to risk of contingent worker liability and to implement measures to minimize common risks associated with the use of contingent labor.

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ENDNOTES

1 See *Vizcaino et al v. Microsoft Corporation*, United States District Court for the Western District of Washington, Case No. CV-93-00178-CRD (D.C. Wash.); *Burrey v. Pacific Gas & Electric Co.*, 159 F.3d 388 (9th Cir. 1998); *Herman v. Time Warner, Inc.*, United States District Court Case, Southern District of New York No. 98 CIV 7589 (Filed October 26, 1998); *Casey et al v. Atlantic Richfield Company et al*, United States District Court Central District of California.

2 See *Miller v. State*, 18 Cal.3d 808, 813-814, 135 Cal.Rptr. 386 (1977).

3 See *Clark v. King County*, Superior Court of Washington for King County, Case No. 95-2-29890-7; *Logan v. King County*, Superior Court of Washington for King County, Case No. 93-2-20233-4 *SEA;Service Employees International Union, Local 998 v. County of Ventura*, Ventura County Superior Court, Case No. CIV176308; *Dewayne Cargill, et al. v. Metropolitan Water District of Southern California, et al.*, Los Angeles Superior Court, Case No. BC191881 (Consolidated with Case Nos. BC 194444 and BS052318); *Hall v. County of Los Angeles, et al.*, Los Angeles Superior Court, Case No. BC 208583; *Shiell v. County of Los Angeles, et al.*, Los Angeles Superior Court, Case No. BC 208582; *Local 715 of the Service Employees International Union v. Santa Clara County*, (Filed June, 1999).

4 Steven Hipple and Jay Stewart, "Earnings and benefits of workers in alternative work arrangements", Monthly Labor Review, October 1996.

5 "When is a temp not a temp?" Business Week, December 7, 1998.

6 In determining whether a worker is an employee or independent contractor, the IRS follows the common law standard which focuses on who has the right to direct and control the worker who performs the services. The IRS uses a 20 factor test as an analytical tool to make the determination. See Rev. Rul. 87-41, 1987-1 C.B 296 (1987 IRB Lexis 254); *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-324, 112 S.Ct. 1344, 1176 L.Ed.2d 581 (1992). See also IRS Training Materials, "Employee or Independent Contractor," Training 3320-102 (7-96) TPDS. A multi-factored test is also used to address the issue of who is the employer of a temporary agency worker. See Rev. Rul. 75-41, 1975-1 C.B. 323 (IRB Lexis 697) (agency providing services of secretaries, nurses and dental hygienists on ongoing basis is the common law employer); Rev. Rul. 87-41 (Situation One) (provider of temporary technical services is employer of computer programmer assigned to client's business).

7 See *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1995) ("Vizcaino I"), aff'd 120 F.3d 1006 (9th Cir. 1997) (en banc) ("Vizcaino II"), Decision on Petition for Writ of Mandamus filed May 12, 1999.

8 It should be noted that the workers were found to be ineligible for the majority of Microsoft's benefit plans at the trial court level based on the terms of the plans themselves. However, the Court found that the ESPP expressly incorporated provisions of § 423 of the Internal Revenue Code, 26 U.S.C. § 423 (1994), and further found that § 423 requires that qualifying stock purchase plans permit all common law employees to participate. Vizcaino I, 97 F.3d at 1197. The certified class was defined as "[a]ll persons employed by Microsoft Corporation . . . who are denied employee benefits because they are considered independent contractors or employees of third-party employment agencies, but who meet the definition of employees of Microsoft under the common law." Id. at 1190 n.1. Since Microsoft in earlier proceedings conceded that all workers were common law employees, the Court found that the plaintiff class was afforded the same options to acquire stock as all other employees. Id. at 1197.

9 Department of Labor regulations under the Family Medical and Leave Act of 1993 specifically address joint employer obligations for temporary agencies, "staffing companies" and client employers. 29 U.S.C. 2601 et. seq.; 29 CFR 825.106 (1995). The Fair Labor Standards Act regulations also provide standards for determining joint employer status. 29 U.S.C. 201 et seq, 20 C.F.R. 791.2 (1993). See Cal. Unemp. Ins. Code §606.5; 22 Cal. Code Regs. tit. 22, § 4304-1; EDD Information Sheet, Temporary Services and Employee Leasing Industries DE 231F Rev. 4 (5-97) for standards governing who is the employer-employee relationships for temporary services. California Fair Employment and Housing Commission has adopted various regulations which which address potential joint employment situations. See California's Pregnancy Disability Leave Act, Cal. Gov't Code § 12945, 2 Cal Code Regs. tit 2, §§ 7286.5(b)(5), California's Family Care Leave Act, Cal. Gov't Code § 12945.2, 2 Cal. Code Regs. tit 2, § 7297.10.

10 159 F.3d 388 (9th Cir. 1998)

11 See EEOC Notice Number 915.002, 12/03/97, "Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms."

12 c.106 H.R. 2298, introduced June 22, 1999 in the House of Representatives. (Referred to Committee on Education and the Workforce)

13 Employers have a duty under the Occupational Safety and Health Act ("OSHA") to comply with workplace safety and health standards. 29 U.S.C 651-678. Under OSHA, records must be kept of contingent workers who are injured while performing assignments for the client. See 29 C.F.R. 1904, Recordkeeping Guidelines for Occupational Injuries and Illnesses (U.S. Dept. of Labor, Bureau of Labor Statistics, 1986).

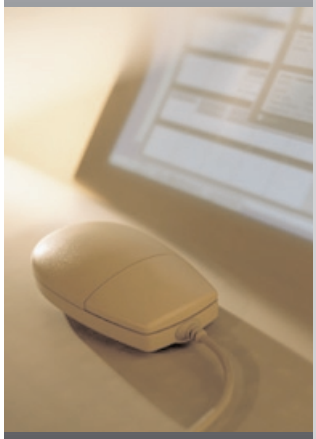
14 See footnote 9.

Continued from page 6

ENDNOTES

1 I apologize in advance if these tips seem jaded or cynical. I can't help it anymore.
2 (1995) 9 Cal.4th 559, 575.
3 (1996) 42 Cal.App.4th 608, 618.
4 (1986) 181 Cal.App.3d 852, 866.
5 Gov't Code § 6250, et seq.
6 See, e.g., *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1124.
7 See, e.g., 14, C.C.R., Secs. 15090, 15091.
8 (1995) 33 Cal.App.4th 144.
9 Id. at 155.
10 Pub. Res. Code § 21167.6(b)(1).
11 Pub. Res. Code § 21167.6(e)(10).
12 In a case where I was serving as petitioner's counsel, I came across sexist comments in an "everything-but-the-kitchen-sink" type of record. We were assigned to a woman judge. Unfortunately, the case settled before I had chance to see the court's reaction.
13 L.A.C.S.C. Rule 9.70(h)(1).
14 This seems somewhat unfair, since in a CEQA challenge, the petitioner has the burden of proof. Pub. Res. Code § 21005(b).

Public Law Section Close to Completion of Project to Increase Access to Internet Legal Resources



The Public Law Section was awarded a grant from the Foundation of the State Bar to develop an Internet site which will assist lawyers and non-lawyers alike, listing over 500 websites which provide access to legal groups such as racial, religious, and political minorities. The website, when fully developed, will also contain lists of addresses for Internet search engines and directories and searchable versions of the United States and California Constitutions, statutes and cases. Moreover, the site will contain information on reaching the various legislative branches of the state and federal government. Please check the California State Bar website at for further information on this exciting project.

MCLE SELF-STUDY TEST

1. In a CEQA case, the court will normally consider reports of expert witnesses even that were not submitted to the lead agency during the administrative proceedings on a project if they are directly relevant to whether the lead agency complied with CEQA.

   ❑ True ❑ False

2. In a CEQA case, either the petitioner or the respondent may request the court to set a briefing and hearing schedule.

   ❑ True ❑ False

3. A petitioner in a CEQA case may elect to prepare the administrative record.

   ❑ True ❑ False

4. The administrative record in a CEQA case must include internal or screencheck drafts of documents which were not released for public comment.

   ❑ True ❑ False

5. The documents comprising the project file for a project which is the subject of an EIR or negative declaration are exempt from public disclosure under the Public Records Act, Government Code § 6250, because CEQA has a separate public review process.

   ❑ True ❑ False

6. The lead agency has 90 days to prepare and certify the administrative record once it is served with a request to prepare the record.

   ❑ True ❑ False

7. Statements made by the lead agency staff regarding the propriety of using a negative declaration will not be considered by the court in a later CEQA challenge since they do not necessarily reflect the views of the decisionmakers.

   ❑ True ❑ False

8. Statements made by an individual member of the commission, board, or other body rendering a decision regarding a project will not be considered by the court in a later CEQA challenge unless the statements are adopted by a majority of the decisionmakers.

   ❑ True ❑ False

9. If a member of the commission, board, or other body rendering a decision regarding a project wishes to vote to disapprove the project, that member is prohibited from voting to certify or approve the EIR or negative declaration for the project.

   ❑ True ❑ False

10. It is not necessary to document the qualifications of the environmental consultants who provide expert reports or testimony, as the court will generally take judicial notice of such qualifications.

    ❑ True ❑ False

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